

# Florida State University Law Review

---

Volume 39 | Issue 2

Article 5

---

2012

## "Bull" Coming from the States: Why the Supreme Court Should Use *Williams v. Illinois* to Close One of Bullcoming's Confrontation Clause Loopholes

Tara R. Price  
0@0.com

Follow this and additional works at: <http://ir.law.fsu.edu/lr>



Part of the [Law Commons](#)

---

### Recommended Citation

Tara R. Price, *"Bull" Coming from the States: Why the Supreme Court Should Use Williams v. Illinois to Close One of Bullcoming's Confrontation Clause Loopholes*, 39 Fla. St. U. L. Rev. (2012) .  
<http://ir.law.fsu.edu/lr/vol39/iss2/5>

This Note is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized administrator of Scholarship Repository. For more information, please contact [bkaplan@law.fsu.edu](mailto:bkaplan@law.fsu.edu).

# FLORIDA STATE UNIVERSITY LAW REVIEW



"BULL" COMING FROM THE STATES:  
WHY THE SUPREME COURT SHOULD USE  
*WILLIAMS V. ILLINOIS* TO CLOSE ONE OF  
*BULLCOMING'S* CONFRONTATION CLAUSE LOOPHOLES

*Tara R. Price*

VOLUME 39

WINTER 2012

NUMBER 2

---

Recommended citation: Tara R. Price, *"Bull" Coming from the States: Why the Supreme Court Should Use Williams v. Illinois to Close One of Bullcoming's Confrontation Clause Loopholes*, 39 FLA. ST. U. L. REV. 533 (2012).

# “BULL” COMING FROM THE STATES: WHY THE SUPREME COURT SHOULD USE *WILLIAMS V. ILLINOIS* TO CLOSE ONE OF *BULLCOMING*’S CONFRONTATION CLAUSE LOOPHOLES

TARA R. PRICE\*

*“[T]he Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another’s testimonial statements provides a fair enough opportunity for cross-examination.”<sup>1</sup>*

|      |  |     |
|------|--|-----|
| I.   | INTRODUCTION .....   | 533 |
| II.  | THE SIXTH AMENDMENT AND THE DEVELOPMENT OF MODERN<br>CONFRONTATION CLAUSE JURISPRUDENCE .....  | 535 |
|      | A. <i>The Sixth Amendment and the Roberts Reliability Test</i> .....   | 535 |
|      | B. <i>Crawford v. Washington: The Beginning of the Modern<br/>Confrontation Clause</i> .....   | 537 |
|      | C. <i>Melendez-Diaz v. Massachusetts: The Court Applies the Confrontation<br/>Clause to Scientific Evidence in Criminal Trials</i> ..... | 539 |
|      | D. <i>The Human Element Creates Unreliability in Science</i> .....   | 540 |
| III. | <i>BULLCOMING V. NEW MEXICO</i> : THE COURT NARROWLY AFFIRMS THE<br>CONFRONTATION CLAUSE’S PROMISE OF CROSS-EXAMINATION .....            | 543 |
|      | A. <i>Bullcoming: The Facts</i> .....  | 544 |
|      | B. <i>Analyzing the Supreme Court’s Opinion in Bullcoming</i> .....  | 547 |
| IV.  | JUSTICE SOTOMAYOR’S FOUR <i>BULLCOMING</i> LOOPHOLES .....   | 550 |
|      | A. <i>The Evidence is Offered for “an Alternate Purpose”</i> .....   | 550 |
|      | B. <i>The Report is Merely a Machine-Generated Printout</i> .....  | 550 |
|      | C. <i>The Substitute Witness is a Supervisor or Test Reviewer</i> .....  | 552 |
|      | D. <i>The Witness Relied on Testimonial Evidence to Give Her<br/>Independent Opinion</i> .....   | 554 |
| V.   | <i>WILLIAMS V. ILLINOIS</i> : THE COURT’S OPPORTUNITY TO CLOSE ONE OF<br>JUSTICE SOTOMAYOR’S <i>BULLCOMING</i> LOOPHOLES .....           | 555 |
|      | A. <i>Williams v. Illinois: The Facts</i> .....  | 556 |
|      | B. <i>Analyzing Williams v. Illinois</i> .....   | 558 |
| VI.  | CONCLUSION .....   | 561 |

## I. INTRODUCTION

Imagine that you are selected as a juror in a trial where the defendant is accused of driving while under the influence of alcohol. You listen to the police officer who testifies that he observed the

---

\* J.D. Candidate, May 2012, Florida State University College of Law; B.A. Political Science, 2001, University of South Florida. I wish to thank Professor Charles W. Ehrhardt for his helpful guidance on the Court’s development of the Confrontation Clause and its implications in the courtroom and Professor Nat S. Stern for his input on earlier drafts and encouragement of my scholarship. Finally, thank you to my husband, Trey Price, for his love, encouragement, and constant support.

1. *Bullcoming v. New Mexico (Bullcoming III)*, 131 S. Ct. 2705, 2716 (2011).

defendant and believed him to be intoxicated. You hear about how, after obtaining a warrant, the officer took the defendant to the emergency room for a blood-alcohol test. The police officer finishes his testimony, and the next witness will testify about the results of the defendant's blood-alcohol test.

But before the witness can testify, defense counsel objects. Apparently, this is not the laboratory analyst who conducted the test. In fact, this expert witness did not observe the testing process, write the lab report soon to be admitted into evidence, or certify that the testing results were accurate. The actual analyst who performed the test will not appear as a witness because he is on unpaid administrative leave. And no, you may not know why.

The judge overrules the objection and the uninvolved expert witness testifies about the lab's procedures and answers questions about what the lab report states—that the defendant had a blood-alcohol level above the legal limit. On the stand, however, the uninvolved expert witness admits that he cannot verify that that lab's procedures were actually followed. Would you convict?

In reality, this hypothetical scenario is not as hypothetical as it may seem.<sup>2</sup> Numerous juries have convicted defendants based on second-hand (or hearsay) expert witness testimony about laboratory reports performed and certified by other analysts who never appeared at trial.<sup>3</sup>

On June 23, 2011, however, the Supreme Court put this practice to a stop in *Bullcoming v. New Mexico*.<sup>4</sup> Or did it? In perhaps the closest majority in recent Confrontation Clause history, the Supreme Court affirmed that the protections of the Sixth Amendment extend to the admission of scientific evidence against a defendant, so long as the evidence consists of a written report admitted at trial. Thus, in the case of the hypothetical, the defendant would have the right to cross-examine an analyst involved in the testing process, though not necessarily the actual analyst who performed the test. Despite the sound foundations of the majority's reasoning, however, the Court failed to create a clear rule in *Bullcoming*,<sup>5</sup> giving states multiple

---

2. See *State v. Bullcoming* (*Bullcoming I*), 189 P.3d 679, 681-82, 684 (N.M. Ct. App. 2008), *aff'd*, 226 P.3d 1 (N.M. 2010), *rev'd*, 131 S. Ct. 2705 (2011).

3. See *infra* Part IV.B-D; see also FED. R. EVID. 801(c) (defining hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted").

4. 131 S. Ct. 2705 (2011).

5. Arguably, the Court has taken nothing but a cautious series of "baby steps" through its modern Confrontation Clause jurisprudence: *Crawford v. Washington*, 541 U.S. 36 (2004), *Davis v. Washington*, 547 U.S. 813 (2006), *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), *Michigan v. Bryant*, 131 S. Ct. 1143 (2011), *Bullcoming III*, 131 S. Ct. 2705 (2011), and now *Williams v. Illinois*, 131 S. Ct. 3090 (2011). See CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT, at ix-x (1999) (recommending that courts "avoid[] clear rules and final resolutions" to be "[a]lert to the

loopholes to use to avoid implicating Confrontation Clause requirements. The Court may move to close one of these four loopholes relatively quickly: the Court granted certiorari in *Williams v. Illinois*<sup>6</sup> five days after deciding *Bullcoming*, ensuring we have not heard the Court's "last word" on the Confrontation Clause as it applies to the admission of scientific evidence against defendants.

This Note examines the modern history of the Confrontation Clause, beginning with the Court's decision to overturn more than two decades of Confrontation Clause jurisprudence in *Crawford v. Washington*<sup>7</sup> and continuing with *Melendez-Diaz v. Massachusetts*<sup>8</sup> requirements for the admission of testimonial scientific evidence. Second, this Note examines the Court's recent decision in *Bullcoming*, particularly Justice Sotomayor's concurrence. This Note argues that Justice Sotomayor's four limitations on *Bullcoming*'s holding provide lower courts with a series of loopholes they may continue to use to avoid Confrontation Clause requirements, at least until the Court directly addresses each of the loopholes. Finally, this Note urges the Court to close one of Justice Sotomayor's *Bullcoming* loopholes by reversing the Illinois Supreme Court's decision in *People v. Williams*.<sup>9</sup> The Supreme Court should not tolerate prosecutors' attempts to avoid Confrontation Clause requirements by introducing otherwise testimonial evidence through surrogate witnesses under the guise of Federal Rule of Evidence 703.

## II. THE SIXTH AMENDMENT AND THE DEVELOPMENT OF MODERN CONFRONTATION CLAUSE JURISPRUDENCE

### A. *The Sixth Amendment and the Roberts Reliability Test*

The Sixth Amendment of the U.S. Constitution places a constitutional burden on the government, in addition to any applicable federal or state evidentiary rules, for admitting evidence against a defendant at trial. In relevant part, the Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."<sup>10</sup> But how should the Court define "witnesses against" or "to be confronted"? Are neutral scientists "witnesses against" a defendant? Should expert witnesses

---

problem of unanticipated consequences" and "promote the democratic ideals of participation, deliberation, and responsiveness").

6. 131 S. Ct. 3090 (2011).

7. 541 U.S. 36 (2004).

8. 129 S. Ct. 2527 (2009).

9. *People v. Williams (Williams II)*, 939 N.E.2d 268 (Ill. 2010), *cert. granted*, 131 S. Ct. 3090 (June 28, 2011) (No. 10-8505).

10. U.S. CONST. amend. VI. In addition to applying to federal criminal trials, the Confrontation Clause applies to state criminal proceedings via the Fourteenth Amendment of the U.S. Constitution. *Pointer v. Texas*, 380 U.S. 400, 406 (1965).

be able to testify to their own independent opinions when those opinions are based on inadmissible testimonial evidence?

As the Court noted in 2004, “[t]he Constitution’s text does not alone resolve” the matter.<sup>11</sup> Courts are frequently in disagreement about exactly how the Confrontation Clause intersects with the Federal Rules of Evidence, particularly hearsay rules.<sup>12</sup> Even the Supreme Court has reversed its own analysis when navigating complex cases involving the intersection of the Confrontation Clause and hearsay rules.<sup>13</sup>

Under the Court’s earlier holding in *Ohio v. Roberts*,<sup>14</sup> the Confrontation Clause was an empty safeguard for defendants, seemingly granting strong protection, but in reality providing prosecutors with numerous exceptions to evade its enforcement.<sup>15</sup> Permitting these exceptions was a practicality for the Court, because if the Constitution were read literally, the Confrontation Clause “would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme.”<sup>16</sup> As such, out-of-court statements were permitted at trial, so long as the prosecution could show that the witness was unavailable<sup>17</sup> and that the evidence bore “adequate ‘indicia of reliability.’”<sup>18</sup> The Court held that reliability could be shown by meeting a “firmly rooted hearsay exception,”<sup>19</sup> despite noting the hearsay rule had been “riddled with exceptions developed over three centuries” ago and resembled “an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists and surrealists.”<sup>20</sup> Even if the evidence did not meet one of the several hearsay exceptions within the Federal Rules of Evidence,<sup>21</sup> it could properly be

---

11. *Crawford*, 541 U.S. at 42.

12. See *infra* Parts IV.D, V.B.

13. Compare *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (stating that “certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the ‘substance of the constitutional protection’”) (quoting *Mattox v. United States*, 156 U.S. 237, 244 (1895)), with *Crawford*, 541 U.S. at 51 (overturning *Roberts* and stating that “[l]eaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices”).

14. 448 U.S. 56.

15. The *Crawford* Court held that its earlier reasoning in *Roberts* was “so unpredictable that it fail[ed] to provide meaningful protection from even core confrontation violations.” *Crawford*, 541 U.S. at 63.

16. *Roberts*, 448 U.S. at 63.

17. To show unavailability, the state must have made a good-faith effort to obtain the witness’s presence at trial. *Barber v. Page*, 390 U.S. 719, 725 (1968).

18. *Roberts*, 448 U.S. at 66.

19. *Id.*

20. *Id.* at 62 (quoting Edmund M. Morgan & John MacArthur Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 921 (1937)).

21. See FED. R. EVID. 803-04.

admitted against the defendant at trial so long as it presented a "particularized guarantee[] of trustworthiness."<sup>22</sup>

*B. Crawford v. Washington: The Beginning of the Modern Confrontation Clause*

Led by Justice Scalia, a seven-member majority<sup>23</sup> on the Court took a dramatic turn in Confrontation Clause history in *Crawford v. Washington*.<sup>24</sup> Overturning the *Roberts* decision and its reasoning, the Court examined the Confrontation Clause's history<sup>25</sup> and determined that "[a]dmitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation."<sup>26</sup> Reflecting on the previous twenty-four years, the Court noted that "[t]he legacy of *Roberts* in other courts vindicates the Framers' wisdom in rejecting a general reliability exception."<sup>27</sup> What the Confrontation Clause guaranteed, the Court held, was not that evidence could be admitted after being deemed reliable, "but that reliability [must] be assessed in a particular manner: by testing in the crucible of cross-examination."<sup>28</sup>

"[W]ritten evidence . . . [is] almost useless," as the Framers recognized, and "very seldom leads to the proper discovery of truth."<sup>29</sup> A trial judge or jury cannot possibly determine, based on written evidence alone, whether test results were fabricated, poorly performed, or otherwise the product of fraud. Unlike reliance on a written statement, cross-examination provides the defendant with her constitutional right to test the witness's perception, credibility, and partiality.<sup>30</sup>

The *Crawford* Court, however, did not hold that all evidence admitted against the accused was subject to a Confrontation Clause analysis.<sup>31</sup> The majority was mainly concerned with evidence it con-

---

22. *Roberts*, 448 U.S. at 66.

23. Justices Stevens, Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer formed *Crawford*'s majority opinion; Chief Justice Rehnquist and Justice O'Connor filed a concurring opinion. *Crawford v. Washington*, 541 U.S. 36, 36-76 (2004).

24. *Id.*

25. For the Court's historical background on the Confrontation Clause, see *id.* at 42-50.

26. *Id.* at 61. "Dispensing with confrontation because testimony is obviously reliable," the Court held, "is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." *Id.* at 62. The *Crawford* Court was concerned that "[r]eliability is an amorphous, if not entirely subjective, concept." *Id.* at 63.

27. *Id.* For example, *Roberts* would have allowed trial courts to determine that the need for "effective law enforcement" outweighed a defendant's Confrontation Clause rights. *Roberts*, 448 U.S. at 64.

28. *Crawford*, 541 U.S. at 61. "To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee." *Id.*

29. *Id.* at 49 (alteration in original) (quoting R. Lee, Letter IV by the Federal Farmer (Oct. 15, 1787), reprinted in 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 469, 473 (1971)).

30. *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

31. *Crawford*, 541 U.S. at 51 (stating the Confrontation Clause "reflects an especially acute concern with a specific type of out-of-court statement").

sidered “testimonial.”<sup>32</sup> Once a witness’s evidence is considered testimonial, it may not be admitted without showing the witness’s unavailability and a prior opportunity for cross-examination.<sup>33</sup> Even when a witness was clearly absent from the jurisdiction, the Court has held that the government had not shown unavailability until it sought in good faith the witness’s presence.<sup>34</sup>

With *Crawford*, Justice Scalia’s seven-member majority attempted to make clear that a defendant’s right to cross-examination is so fundamental that alternative methods of showing a statement’s reliability would not suffice.<sup>35</sup> Chief Justice Rehnquist and Justice O’Connor concurred with the majority’s ultimate holding, but disagreed with the Court’s overruling of *Roberts*.<sup>36</sup> Specifically, Chief Justice Rehnquist took aim at the majority’s decision to bifurcate testimonial and nontestimonial evidence for purposes of the Confrontation Clause. Rehnquist argued that the *Crawford* decision was “not backed by sufficiently persuasive reasoning” and that it “cast[] a mantle of uncertainty over future criminal trials.”<sup>37</sup>

And “cast[] a mantle of uncertainty” *Crawford* did. Courts struggled with determining whether a variety of different types of evidence were testimonial.<sup>38</sup> Two years after *Crawford*, in *Davis v. Washington*,<sup>39</sup> the Court made the definition of “testimonial” a bit murkier. Despite *Crawford*’s suggestion that police interrogations were likely testimonial,<sup>40</sup> in *Davis*, the Court held that they might not be testimonial after all if they were conducted to meet an ongoing emergency.<sup>41</sup> But were the results of scientific tests testimonial? In subsequent years, courts across the country were holding that many types of

---

32. Testimonial statements included “*ex parte* in-court testimony or its functional equivalent,” including “material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially” and police officer interrogations. *Id.* at 51-52 (quoting Brief for Petitioner at 23, *Crawford*, 541 U.S. 36 (No. 02-9410), 2003 WL 21939940).

33. *Id.* at 59. Even where the defendant had a prior opportunity for cross-examination, the Court “excluded the testimony where the government had not established unavailability of the witness.” *Id.* at 57.

34. *Barber v. Page*, 390 U.S. 719, 725 (1968) (holding that the government had not shown unavailability, even though the witness was in a federal prison in another state). The *Barber* Court also noted that securing out-of-state witnesses was not difficult because participating states could use the “Uniform Act [t]o Secure the Attendance of Witnesses from Without a State in Criminal Proceedings” to compel private citizens to appear in Court to testify. *Id.* at 723 n.4; see also 2 BARBARA E. BERGMAN & NANCY HOLLANDER, WHARTON’S CRIMINAL EVIDENCE § 10:12 n.78 (15th ed. 2010) (providing the specific statutes for all 50 states that have adopted some version of the Uniform Act).

35. *Crawford*, 541 U.S. at 61-62.

36. *Id.* at 69-76 (Rehnquist, C.J., concurring).

37. *Id.* at 69 (Rehnquist, C.J., concurring).

38. See, e.g., discussion *infra* notes 100-02 and accompanying text.

39. 547 U.S. 813 (2006).

40. *Crawford*, 541 U.S. at 52.

41. *Davis*, 547 U.S. at 822.



scientific evidence, such as lab reports and certifications of substances' chemical compositions, were not testimonial because they were "regularly conducted business activit[ies]," thus eligible for admission as a hearsay exception.<sup>42</sup> Other courts considered scientific evidence nontestimonial because it was raw data and not the product of expert opinion.<sup>43</sup>

C. *Melendez-Diaz v. Massachusetts: The Court Applies the Confrontation Clause to Scientific Evidence in Criminal Trials*

It was not until 2009 that the Supreme Court first determined whether sworn scientific certificates were testimonial.<sup>44</sup> Still led by Justice Scalia, only five justices joined the majority opinion,<sup>45</sup> but several aspects of the decision left significant doubt as to the limitations on the Court's opinion.

In *Melendez-Diaz*, the majority held that a defendant's right to confront adverse witnesses extended beyond those who observed an alleged crime and included laboratory scientists who analyzed criminal evidence in preparation for trial.<sup>46</sup> The Court found that certified laboratory certificates, which were notarized and provided the composition, quality, and net weight of a substance, were within the "core class of testimonial statements" because they were "quite plainly affidavits."<sup>47</sup>

However, despite *Melendez-Diaz* "involv[ing] little more than the application of [the Court's] holding in *Crawford*,"<sup>48</sup> Justice Thomas's concurrence removed all doubt about the reach of the majority opinion. Justice Thomas stated that he joined the majority only because the laboratory certificates were "formalized testimonial materials."<sup>49</sup> As such, courts speculated on the reach of the Court's decision if the certificates admitted into evidence were unsworn.<sup>50</sup>

---

42. See, e.g., *Bullcoming I*, 189 P.3d 679, 684-85 (N.M. Ct. App. 2008) (quoting *State v. Dedman*, 102 P.3d 628, 639 (N.M. 2004), *aff'd*, 226 P.3d 1 (N.M. 2010), *rev'd*, 131 S. Ct. 2705 (2011)).

43. See, e.g., cases cited *infra* note 135.

44. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009).

45. Justices Stevens, Scalia, Souter, Thomas, and Ginsburg formed the five-member majority in *Melendez-Diaz*. *Id.* at 2530-42. However, Justice Thomas additionally wrote a separate concurring opinion emphasizing the narrowness of his agreement. *Id.* at 2543 (Thomas, J., concurring). Justices Kennedy and Breyer, formerly in the *Crawford* majority, joined Chief Justice Roberts and Justice Alito in dissent. *Id.* at 2543-61 (Kennedy, J., dissenting).

46. *Id.* at 2532.

47. *Id.* Affidavits were specifically mentioned within the definition of testimonial articulated in *Crawford*. *Crawford v. Washington*, 541 U.S. 36, 51 (2004).

48. *Melendez-Diaz*, 129 S. Ct. at 2542.

49. *Id.* at 2543 (Thomas, J., concurring) (citing his prior concurrences in *White v. Illinois*, 502 U.S. 346 (1992), *Giles v. California*, 128 S. Ct. 2678 (2008), and *Davis v. Washington*, 547 U.S. 813 (2006)).

50. See *infra* note 160.

Justice Thomas did not object, however, to the majority's holding in regards to the categorization of laboratory scientists as adverse witnesses. Despite the State of Massachusetts' argument that scientists were not "accusatory witnesses" because they were only testifying about scientific facts (as opposed to the defendant's guilt), the majority quickly dispelled the notion that any witness in a criminal trial could be neutral.<sup>51</sup> Because the scientific evidence was testimonial and the analyst certifying its authenticity was accusatory, the state was required under the U.S. Constitution to present the analyst for confrontation at trial.<sup>52</sup>

The *Melendez-Diaz* majority reaffirmed that the Confrontation Clause is a procedural guarantee, once again stating that reliability is assessed through cross-examination, not the eyes of a trial judge.<sup>53</sup> Further, the majority insisted cross-examining analysts was essential because "neutral scientific testing" was not as "neutral or as reliable" as the state suggested.<sup>54</sup>

#### D. *The Human Element Creates Unreliability in Science*

Scientific tests are neither inherently neutral nor reliable: the tests themselves can rely upon bad or outdated science, and the scientists performing the tests have been found to falsify, manipulate, or improperly perform them.<sup>55</sup> For example, in 2004, the National Academy of Sciences found that due to variations in the manufacturing of bullets, the Federal Bureau of Investigation's (FBI) decades-long practice of relying on "comparative bullet-lead analysis" in criminal trials was "unreliable and potentially misleading."<sup>56</sup> Despite "[h]undreds of defendants sitting in prisons nationwide" convicted with the help of FBI testimony that was "overstated" and "misleading under [the] [F]ederal [R]ules of [E]vidence," the FBI "never [went] back to determine how many times its scientists misled jurors."<sup>57</sup> Years later, the National Academy released a report criticizing numerous forensic laboratory practices across the country involving the

---

51. *Melendez-Diaz*, 129 S. Ct. at 2533-34 (stating that the analysts "certainly provided testimony *against* petitioner"). "The text of the [Sixth] Amendment contemplates two classes of witnesses—those against the defendant and those in his favor. . . . Contrary to respondent's assertion, there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation." *Id.* at 2534.

52. *Id.* at 2533-34.

53. *Id.* at 2536 (quoting *Crawford v. Washington*, 541 U.S. 36, 61-62 (2004)).

54. *Id.*

55. *Id.* at 2536-37.

56. John Solomon, *FBI's Forensic Test Full of Holes*, WASH. POST, Nov. 18, 2007, at A1.

57. *Id.* (stating that the FBI first had concerns about the science as early as 1991 and that the concerns were only publicly revealed after a former FBI laboratory scientist decided to challenge the practice).

scientific analyses of "fingerprinting, firearms identification[,] . . . bite marks, blood spatter, hair and handwriting."<sup>58</sup>

Scientists may also make errors in judgment or produce fraudulent test results. Analysts working at law enforcement's request often "face pressure to sacrifice appropriate methodology for the sake of expediency."<sup>59</sup> Law enforcement may also give analysts incentives to alter evidence to help the prosecution.<sup>60</sup> Analysts have even been found to engage in deliberate, systematic fraud.<sup>61</sup>

Even if the analyst performed the test to the best of her abilities, the scientific testing of evidence is not inherently reliable.<sup>62</sup> Scientific tests, including the frequently used gas spectrometer/mass chromatographer (GC/MS) and polymerase chain reaction DNA tests, require the analyst to use independent judgment and skill.<sup>63</sup> The GC/MS "is like working a jigsaw puzzle," and an analyst performing the test "may commit a number of errors that will render the ultimate opinion unsound."<sup>64</sup> In fact, analysts can make four "critical errors" in interpreting GC/MS results.<sup>65</sup> An analyst making even one of these errors in judgment could alter the identification of the sample.<sup>66</sup>

---

58. Solomon Moore, *Science Found Wanting in Nation's Crime Labs*, N.Y. TIMES, Feb. 5, 2009, at A1 (stating that "such analyses are often handled by poorly trained technicians who then exaggerate the accuracy of their methods in court"); see generally Nat'l Research Council of the Nat'l Acads., *Strengthening Forensic Science in the United States: A Path Forward* (2009), available at <http://www.nap.edu/catalog/12589.html>.

59. *Melendez-Diaz*, 129 S. Ct. at 2536 (quoting Nat'l Research Council of the Nat'l Acads., *supra* note 58, at 24).

60. See Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 497 & n.99, 498 (2006) (citing a Federal Bureau of Investigation study that found prosecutors sometimes pressure analysts to "push the envelope" and that the analysts, in turn, respond).

61. *Melendez-Diaz*, 129 S. Ct. at 2536-37 (discussing several documented cases of error, fraud, and instances where forensic scientists engaged in "drylabbing" by reporting the results of tests never performed); Metzger, *supra* note 60, at 499 (detailing a West Virginia forensic serologist who disregarded procedures, altered records, and deliberately misreported test results from 1979 until 1989).

62. *Melendez-Diaz*, 129 S. Ct. at 2537 (stating "[c]onfrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well").

63. *Id.*

64. 2 P. GIANNELLI & E. IMWINKELRIED, *SCIENTIFIC EVIDENCE* § 23-3(C), at 402-403 (3d ed. 1999).

65. *Id.* (including (1) improper preparation of the sample where the GC fails to separate the sample before the MS analysis occurs; (2) miscounting mass unit numbers along the spectrum; (3) disregarding one peak along the spectrum, which could change the drug's identification if the analyst chose to include it; and (4) failing to distinguish between the true parent peak and a false isotopic peak). The Supreme Court recognized the potential for these four errors in *Melendez-Diaz*. *Melendez-Diaz*, 129 S. Ct. at 2537.

66. See GIANNELLI & IMWINKELRIED, *supra* note 64; see also *Melendez-Diaz*, 129 S. Ct. at 2537-38 (recognizing that even though GC/MS machines can be "equipped with computerized matching systems, 'forensic analysts in crime laboratories typically do not utilize this feature of the instrument, but rely exclusively on their subjective judgment.'" (quoting James M. Shellow, *The Application of Daubert to the Identification of Drugs*, 2 SHEPARD'S EXPERT & SCI. EVIDENCE Q. 593, 600 (1995))).

Further, performing DNA tests and analyzing the results requires more independent analysis than the GC/MS test, presenting even more opportunity for errors in judgment.<sup>67</sup> With such a high potential for error, defendants must have “a reasonable opportunity to determine through cross-examination if any such error or falsification is present in any DNA testing admitted into evidence.”<sup>68</sup>

Jurors give scientific test results significant credibility in a criminal trial.<sup>69</sup> Confronting scientists in the courtroom gives defendants the opportunities to uncover errors in judgment or faulty procedures in a way they never could without cross-examination.<sup>70</sup> Even if cross-examination proved ineffective in an individual case, the Court found the “prospect of confrontation” was important because it would help “deter fraudulent analysis in the first place.”<sup>71</sup>

In a sign of restraint, however, and possibly to help keep hold on its majority, the *Melendez-Diaz* Court specifically held that it was not requiring in-court testimony from everyone who knew something about the evidence’s authenticity or the accuracy of the testing devices.<sup>72</sup> In the infamous footnote 1, the Court held that any gaps in the chain of custody would go to the weight of the evidence, not its admissibil-

---

67. *Williams II*, 939 N.E. 2d 268, 279 (Ill. 2010) (citing P. GIANNELLI & E. IMWINKELRIED, *SCIENTIFIC EVIDENCE* § 18.04(b), at 57 (4th ed. 2007) (stating “when technical problems materialize, it can be very difficult to interpret the electropherograms . . . . Thus, there is room for subjective judgment”)), *cert. granted*, 131 S. Ct. 3090 (June 28, 2011) (No. 10-8505). For a brief explanation of polymerase chain reaction testing (a common form of DNA testing), see *id.* at 271.

68. *United States v. Boyd*, 686 F. Supp. 2d 382, 384 (S.D.N.Y. 2010) (holding that denying the defendant the opportunity to question an analyst on his results and conclusions is a violation of the defendant’s Confrontation Clause rights).

69. Nat’l Research Council of the Nat’l Acads., *supra* note 58, at 48-49 (stating that academics are concerned with whether “the conclusiveness and finality of the manner in which forensic evidence is presented on television results in jurors giving more or less credence to the forensic experts and their testimony than they should, raising expectations, and possibly resulting in a miscarriage of justice”). For additional research analyzing the possibility of the *CSI* Effect, see Jennifer B. Sokoler, Note, *Between Substance and Procedure: A Role for States’ Interests in the Scope of the Confrontation Clause*, 110 COLUM. L. REV. 161, 163 n.11, 179 n.93 (2010) (citing multiple studies); Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 YALE L.J. 1050, 1053 (2006) (noting that after Robert Blake’s acquittal, “jurors complained about the lack of fingerprints, DNA, and gunshot residue—evidence not often available in criminal trials but frequently used on television”); Simon A. Cole & Rachel Dioso-Villa, *Investigating the ‘CSI Effect’ Effect: Media and Litigation Crisis in Criminal Law*, 61 STAN. L. REV. 1335, 1343 (2009) (analyzing *CSI* as a “cultural phenomenon” and possibly a “self-denying prophecy” promoted by prosecutors); and Hon. Donald E. Shelton, Young S. Kim & Gregg Barak, *A Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the “CSI Effect” Exist?*, 9 VAND. J. ENT. & TECH. L. 331, 332-33 (2006) (concluding, after a survey of 1,027 jurors who served in a Michigan state court during the summer of 2006, that the *CSI* effect was “mixed” but a “broader tech effect” may be causing increased juror demand for scientific evidence).

70. *Melendez-Diaz*, 129 S. Ct. at 2536-37.

71. *Id.* at 2537.

72. *Id.* at 2532 n.1.

ity, and that so long as the prosecution introduced the testimony live (through a qualified witness), the evidence was admissible.<sup>73</sup>

Footnote 1 also legitimately gave prosecutors some wiggle room when it came to which witnesses they would present at trial for cross-examination.<sup>74</sup> This wiggle room "confound[ed] the lower courts," allowing the states to read *Melendez-Diaz* narrowly and continue to evade the constitutional requirements of the Confrontation Clause through a number of measures.<sup>75</sup> Fifteen months after the *Melendez-Diaz* decision, by granting one defendant's petition for writ of certiorari, the Court waded back into determining what the Confrontation Clause requires for the admission of scientific evidence, if anything.<sup>76</sup>

### III. *BULLCOMING* V. *NEW MEXICO*: THE COURT NARROWLY AFFIRMS THE CONFRONTATION CLAUSE'S PROMISE OF CROSS-EXAMINATION

The *Bullcoming*<sup>77</sup> opinion represents the Court's closest-held Confrontation Clause majority in recent history. Written by Justice Ginsburg, the majority opinion held that when a forensic laboratory report containing testimonial statements is entered into evidence, the Confrontation Clause guarantees the defendant the right to confront the scientist who certified the testimonial information.<sup>78</sup> And yet, in a case where the facts were "materially indistinguishable" from *Melendez-Diaz*,<sup>79</sup> an analysis of the Court's majority, concurring, and dissenting opinions<sup>80</sup> shows this seemingly straightforward application of Confrontation Clause law was anything but clear-cut for the Justices.

---

73. *Id.*

74. *Id.* (stating "it is up to the prosecution to decide what steps in the chain of custody are so crucial as to require" live testimony).

75. Joëlle Anne Moreno, *C.S.I. BullS#!t: The National Academy of Sciences, Melendez-Diaz v. Massachusetts, and Future Challenges to Forensic Science and Forensic Experts*, 2010 UTAH L. REV. 327, 331 (2010) (calling the post-*Melendez-Diaz* cases "so disparate and bizarre" and providing as many as seven different factors used by the lower courts in making their ultimate decisions).

76. *Bullcoming v. New Mexico*, 131 S. Ct. 62 (2010) (granting certiorari).

77. 131 S. Ct. 2705 (2011).

78. *Id.* at 2710.

79. *Id.* at 2721 (Sotomayor, J., concurring).

80. Justice Ginsburg wrote a fractured majority opinion, with Justice Scalia joining in full, Justices Sotomayor and Kagan objecting to Part IV, and Justice Thomas objecting to Part IV and footnote 6. *Id.* at 2705-19. Justice Sotomayor also wrote a concurring opinion. *Id.* at 2719-23 (Sotomayor, J., concurring). Chief Justice Roberts and Justices Kennedy, Breyer, and Alito, as they did in the Court's *Melendez-Diaz* decision, dissented. *Id.* at 2723-28 (Kennedy, J., dissenting).

### A. Bullcoming: *The Facts*<sup>81</sup>

Donald Bullcoming rear-ended Dennis Jackson's pick-up truck while it was stopped at an intersection in Farmington, New Mexico.<sup>82</sup> Jackson's wife called the police after Jackson noticed that Bullcoming's eyes were bloodshot and smelled alcohol on Bullcoming's breath.<sup>83</sup> Bullcoming left the scene of the accident, but an officer subsequently found him and watched him fail a series of field sobriety tests.<sup>84</sup> The police obtained a warrant to perform a blood-alcohol analysis because Bullcoming refused to take a breath test.<sup>85</sup>

Using a gas chromatograph machine,<sup>86</sup> Caylor, an analyst with the New Mexico Department of Health, Scientific Laboratory Division, tested Bullcoming's blood.<sup>87</sup> It was not until the day of the trial, however, that the prosecution informed the court it would not be calling Caylor as a witness, stating only that he had been put on unpaid leave very recently; the prosecution did not disclose the reason.<sup>88</sup> Instead, the State presented another analyst from the laboratory, Razatos, who "was familiar with the laboratory's testing procedures, but had neither participated in nor observed the test on Bullcoming's blood sample."<sup>89</sup> Defense counsel objected, but the trial court admitted the blood analysis report into evidence under the hearsay exception for business records.<sup>90</sup> The trial court also allowed Razatos to testify.<sup>91</sup>

---

81. The facts of *Bullcoming* provide the reader with background perspective on the issues underlying the legal discussions within the case. The author does not suggest that Donald Bullcoming may be innocent of the charges against him. His reprehensible conduct does, however, illustrate that the government's burden is the same high standard, regardless of whether the defendant appears to be guilty or innocent. See *Crawford v. Washington*, 541 U.S. 36, 62 (2004) ("Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.").

In some instances, following Confrontation Clause procedure can make all the difference. See Martin Finucane, *Drug Defendant Retried on High Court's Order is Acquitted*, BOS. GLOBE, Feb. 11, 2011, available at [http://www.boston.com/news/local/massachusetts/articles/2011/02/11/drug\\_defendant\\_retried\\_on\\_high\\_courts\\_order\\_is\\_acquitted/](http://www.boston.com/news/local/massachusetts/articles/2011/02/11/drug_defendant_retried_on_high_courts_order_is_acquitted/) (stating that after the Supreme Court's verdict, Melendez-Diaz was found not guilty in his jury retrial).

82. *State v. Bullcoming (Bullcoming II)*, 226 P.3d 1, 4 (N.M. 2010), *rev'd*, 131 S. Ct. 2705 (2011).

83. *Id.*

84. *Id.* at 4-5.

85. *Id.* at 5.

86. *Id.* at 4.

87. *Bullcoming III*, 131 S. Ct. at 2710.

88. *Id.* at 2711-12. The prosecution did not assert that Caylor was "unavailable" for trial; rather, "[t]he record showed only that [he] was placed on unpaid leave for an undisclosed reason." *Id.* at 2714.

89. *Id.* at 2709; *see also Bullcoming II*, 226 P.3d at 6.

90. *Bullcoming III*, 131 S. Ct. at 2712.

91. *Id.* at 2712 n.3 (noting that the trial judge stated that when he started practicing law "there were no breath tests or blood tests. They just brought in the cop, and the cop said, 'Yeah, he was drunk.'").

At trial, the State of New Mexico admitted the results of Bullcoming's blood sample into evidence, showing his blood-alcohol concentration was 0.21 grams per hundred milliliters.<sup>92</sup> The prosecution asked Razatos whether "any human being could look and write and just record the result" from the gas chromatograph, and he answered in the affirmative.<sup>93</sup> While the blood sample report indicated that Caylor had followed the laboratory's procedures,<sup>94</sup> Razatos also admitted that "you don't know unless you actually observe the analysis that someone else conducts, whether they followed th[e] protocol in every instance."<sup>95</sup> The jury convicted Bullcoming of aggravated DWI (Driving While Intoxicated).<sup>96</sup>

Bullcoming raised five issues on appeal,<sup>97</sup> including whether the trial court violated his Confrontation Clause rights by admitting the blood sample report into evidence when Caylor was not available to testify.<sup>98</sup> One year before *Melendez-Diaz*,<sup>99</sup> the New Mexico Court of Appeals held that Bullcoming's blood alcohol report was admissible because it was nontestimonial "and prepared routinely with guarantees of trustworthiness."<sup>100</sup> Even though *Crawford* abrogated the prior reliability test of *Ohio v. Roberts*, the court of appeals held that it was bound by *State v. Dedman*<sup>101</sup> and that the blood sample report was properly admitted because it met the requirements for hearsay exemption.<sup>102</sup>

---

92. *Id.* at 2710.

93. *Bullcoming II*, 226 P.3d at 6.

94. *Id.*

95. *Bullcoming III*, 131 S. Ct. at 2715 n.8.

96. *Id.* at 2709, 2712.

97. *Bullcoming I*, 189 P.3d 679, 681 (N.M. Ct. App. 2008), *aff'd*, 226 P.3d 1 (N.M. 2010), *rev'd*, 131 S. Ct. 2705 (2011).

98. *Id.*

99. 129 S. Ct. 2527 (2009).

100. *Bullcoming I*, 189 P.3d at 685 (citing *State v. Dedman*, 102 P.3d 628 (N.M. 2004)).

101. *Id.* (citing *Dedman*, 102 P.3d at 636 (holding that the New Mexico courts could still use the *Roberts* reliability test so long as they determined the laboratory reports were nontestimonial evidence, because a "close reading of *Crawford* indicates" that the Supreme Court "appears split" on whether the Confrontation Clause only applies to testimonial evidence)). The *Dedman* court stated that "the [Supreme] Court did not overrule *Roberts*, and it did not reply to [Chief Justice Rehnquist's] assertion that it had done so." *Id.* (citing *Crawford v. Washington*, 541 U.S. 36, 69 (2004) (Rehnquist, C.J., concurring)) (even though Chief Justice Rehnquist dissented from the *Crawford* Court's decision to overrule *Roberts*, he filed a concurring opinion). *But see Crawford*, 541 U.S. at 51-52 (providing a list of the "core class of 'testimonial' statements," including "material such as affidavits" and "formalized testimonial materials").

102. *Bullcoming I*, 189 P.3d at 684-85 (stating that "ordinarily a blood alcohol report is admissible as a public record and presents no issue under the Confrontation Clause because the report is non-testimonial and satisfies the test of *Ohio v. Roberts* . . . abrogated by *Crawford* . . . concerning the admission of hearsay evidence under the Confrontation Clause" (citing *Dedman*, 102 P.3d at 636)). The New Mexico Court of Appeals admitted, "We are bound by *Dedman*, a decision of our Supreme Court, and we therefore do not address the opinions of other states on the issue[,] . . . even when a United States Supreme Court decision seems contra." *Id.* at 685 (quoting *State v. Manzanares*, 674 P.2d 511, 512

One year following the court of appeals' decision, the Supreme Court held in *Melendez-Diaz*<sup>103</sup> that "[t]here [was] little doubt" that analysts' certificates of analysis fell "within the 'core class of testimonial statements' " listed in *Crawford*.<sup>104</sup> The New Mexico Supreme Court had already granted certiorari to hear Bullcoming's appeal<sup>105</sup> and admitted that, post *Melendez-Diaz*, *Dedman* was no longer good law.<sup>106</sup> As such, the New Mexico Supreme Court held that laboratory reports prepared for use at Bullcoming's trial were testimonial and required a qualified witness subject to cross-examination.<sup>107</sup>

However, like many other states that have attempted to reduce some of the burdens of the Confrontation Clause,<sup>108</sup> the New Mexico Supreme Court held that the "Defendant's true 'accuser' was the gas chromatograph machine which detected the presence of alcohol in Defendant's blood, assessed Defendant's [blood-alcohol content], and generated a computer print-out listing its results."<sup>109</sup> Because Caylor "was a mere scrivener," who had "simply transcribed the results generated by the gas chromatograph machine," having another analyst testify in court was "sufficient" to fulfill Bullcoming's Confrontation Clause rights.<sup>110</sup>

---

(1983)). *But see* *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2540 (2009) ("Whether or not they qualify as business or official records, the analysts' statements here—prepared specifically for use at petitioner's trial—were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment.").

103. 129 S. Ct. 2527 (2009).

104. *Id.* at 2532.

105. *Bullcoming I*, 189 P.3d 679 (N.M. Ct. App. 2008), *aff'd*, 226 P.3d 1 (N.M. 2010), *rev'd*, 131 S. Ct. 2705 (2011).

106. *Bullcoming II*, 226 P.3d at 8. The Court also recognized that "*Melendez-Diaz* throws into doubt our assessment in *Dedman* that blood alcohol reports as public records are inherently immune from governmental abuse." *Id.* at 7-8.

107. *Id.* at 8 ("*Melendez-Diaz* made clear that the same concerns of governmental abuse which exist in the production of evidence by law enforcement exist in the production of forensic evidence. . . . '[A] forensic analyst responding to a request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution'") (quoting *Melendez-Diaz*, 129 S. Ct. at 2536).

108. See discussion *infra* Part IV.B.

109. *Bullcoming II*, 226 P.3d at 9 (citing *United States v. Moon*, 512 F.3d 359, 362 (7th Cir. 2008) ("[T]he Confrontation Clause does not forbid the use of raw data produced by scientific instruments, though the interpretation of those data may be testimonial."), *United States v. Washington*, 498 F.3d 225, 230 (4th Cir. 2007) ("The raw data generated by the diagnostic machines are the 'statements' of the machines themselves, not their operators."), and *United States v. Hamilton*, 413 F.3d 1138, 1142-43 (10th Cir. 2005) (concluding that the computer-generated header information accompanying pornographic images retrieved from the Internet "was neither a 'statement' nor a 'declarant'")).

110. *Bullcoming II*, 226 P.3d at 4, 9 (holding that Razatos was a sufficient "surrogate" witness, simply because he was "qualified as an expert witness with respect to the gas chromatograph machine"). The New Mexico Supreme Court did at least recognize that "[a] defendant cannot cross-examine an exhibit." *Id.* at 10.



*B. Analyzing the Supreme Court's Opinion in Bullcoming*

In a strongly-worded majority opinion, the Supreme Court reiterated its commitment to enforcing the principles of the Confrontation Clause,<sup>111</sup> holding that the "potential ramifications of the New Mexico Supreme Court's reasoning . . . raise[d] red flags."<sup>112</sup> One witness's testimonial statement may not be "enter[ed] into evidence through the in-court testimony of a second person."<sup>113</sup> Further, the Court held that Caylor's report was obviously testimonial.<sup>114</sup> Caylor's presence at trial was essential because he was more than a "mere scrivener."<sup>115</sup>

Even if the blood sample report was obviously reliable, "the Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination."<sup>116</sup> Harkening back to much of its reasoning within the *Melendez-Diaz* decision, the Court detailed several significant questions that Razatos could not answer.<sup>117</sup> Perhaps most importantly, Razatos could not testify as to why Caylor was placed on administrative leave, and defense counsel had the right to ask whether Caylor's absence was due to "incompetence, evasiveness, or dishonesty."<sup>118</sup>

---

111. *Bullcoming III*, 131 S. Ct. at 2716 ("Our precedent cannot sensibly be read any other way."). The Court had also previously vacated and remanded a proceeding from the Supreme Court of Virginia for failing to follow the *Melendez-Diaz* precedent when it held that the defendant waived his Confrontation Clause rights by failing to invoke his Compulsory Clause rights under the Sixth Amendment. *Briscoe v. Virginia*, 130 S. Ct. 1316 (2010); see *Melendez-Diaz*, 129 S. Ct. at 2540 (stating "the Compulsory Process Clause [] is no substitute for the right of confrontation" and "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court").

112. *Bullcoming III*, 131 S. Ct. at 2714.

113. *Id.* at 2713, 2715 (citing *Melendez-Diaz*, 129 S. Ct. at 2546 (Kennedy, J., dissenting) (stating that the Court made this point clear in *Davis*)); see *Davis v. Washington*, 547 U.S. 813, 826 (2006) (stating that "we do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman recite the unsworn hearsay testimony of the declarant").

114. *Bullcoming III*, 131 S. Ct. at 2717 (restating, as the Court did in *Melendez-Diaz*, that "document[s] created solely for an 'evidentiary purpose,' . . . made in aid of a police investigation, rank[] as testimonial").

115. *Id.* at 2714. The Court stated that "Caylor certified that he received Bullcoming's blood sample intact," and that he "checked to make sure that the forensic report number and the sample number 'correspond[ed].'" *Id.* (alteration in original). He also certified that he "adher[ed] to a precise protocol" in performing the test and that "no 'circumstance or condition . . . affect[ed] the integrity of the sample or . . . the validity of the analysis.'" *Id.* (alteration in original). "These representations, relating to past events and human actions not revealed in raw, machine-produced data, are meet for cross-examination." *Id.*

116. *Id.* at 2716 (stating also that "no substitute procedure [such as cross examining a substitute witness] can cure the violation").

117. *Id.* at 2715 (stating that Razatos could not testify about "the test and the testing process [Caylor] employed," nor could he "expose any lapses or lies on [Caylor's] part").

118. *Id.* Justice Scalia particularly hammered the Respondent about why Caylor was on unpaid leave, asking if the prosecution intentionally set up their case so that Caylor would not have to testify. Oral Argument at 38, *id.* (No. 09-10876), available at

Justice Ginsburg noted the dissent's "objection [was] less to the application of the Court's decisions in *Crawford* and *Melendez-Diaz* to this case than to those pathmarking decisions themselves."<sup>119</sup> The dissent, however, labeled the majority's opinion as a "new and serious misstep," because *Bullcoming* was provided with a "knowledgeable representative of the laboratory," which was all that is required by the Confrontation Clause.<sup>120</sup> Labeling Caylor a "technician" (as opposed to an "analyst"), the dissent considered Caylor's presence a "hollow formality" and (counter to *Melendez-Diaz*) stated that *Bullcoming* still had the opportunity under the Compulsory Process Clause to call Caylor to the stand.<sup>121</sup> Dismissing the majority's concerns in *Bullcoming* and *Melendez-Diaz*, the dissent considered the scientific process to render "impartial lab reports" through the work of "experienced technicians in laboratories that follow professional norms and scientific protocols."<sup>122</sup>

Several of the Justices failed to join in the opinion in its entirety, arguably falling somewhere in between Justice Ginsburg's majority opinion and Justice Kennedy's dissent.<sup>123</sup> Notably, Justices Sotomayor, Kagan, and Thomas refused to join in Part IV of the majority opinion, leaving only Justices Ginsburg and Scalia to advance the notion that the *Bullcoming* holding will not "impose an undue burden on the prosecution" and that the "predictions of dire consequences . . . are dubious."<sup>124</sup> Perhaps Justices Sotomayor, Kagan, and Thomas were not willing to agree that retesting the evidence is almost always an option or that the burden of initiating the retesting of evidence

---

[http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/09-10876.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-10876.pdf) (stating that "I don't know what the facts are, but boy, it smells bad to me. It really does," and that "the mere possibility" that the prosecution set up the case to avoid Caylor's cross-examination "shows why you should have to bring this person in if you want to introduce his testimony").

119. *Bullcoming III*, 131 S. Ct. at 2713 n.5.

120. *Id.* at 2723 (Kennedy, J., dissenting).

121. *See id.* at 2724 (Kennedy, J., dissenting). The *Melendez-Diaz* Court previously rejected this argument when it stated that a defendant's "ability to subpoena" laboratory analysts under the Compulsory Process Clause was "no substitute for the right of confrontation." *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2540 (2009).

122. *Bullcoming III*, 131 S. Ct. at 2726 (Kennedy, J., dissenting).

123. *See supra* note 80. Despite the *Bullcoming* Court issuing a majority opinion with which most Justices agreed, Justices Thomas's, Kagan's, and Sotomayor's refusal to join in the entire opinion effectively limits its precedential value. *Cf. Marks v. United States*, 430 U.S. 188, 193 (1977) (stating that plurality opinions of the Court where no single rationale explains the result should be read to advance the concurring opinion "on the narrowest grounds").

124. *Bullcoming III*, 131 S. Ct. at 2717-18 (stating that only a "small fraction . . . of cases" go to trial and estimating that "nearly 95% of convictions in state and federal courts are obtained via guilty plea") (citing *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2540 (2009)). Justices Ginsburg and Scalia also stated that defendants routinely stipulate to admitting scientific evidence and that "analysts testify in only a very small percentage of cases," because defense counsel likely would not want to "highlight" the scientific evidence through live testimony. *Id.* at 2718.

would properly fall on the State, and not a defendant, when the testing analyst is unavailable.<sup>125</sup> Most troubling, however, is Justice Sotomayor's concurring opinion, which painstakingly "emphasize[d] the limited reach of the Court's opinion" and describes several factual scenarios that *Bullcoming* "does not present."<sup>126</sup>

For Justice Sotomayor, the blood sample report was testimonial because "its 'primary purpose' [was] evidentiary," particularly considering the lab report's formality.<sup>127</sup> Perhaps one reason that Justices Sotomayor and Thomas consider formality an important component of testimonial statements is that informal statements are given less weight and credibility than formal ones.<sup>128</sup>

Justice Sotomayor's limitations on the reach of the majority opinion—by illustrating several factual scenarios that the majority opinion did not address—almost certainly invites the states to continue to reduce Confrontation Clause burdens on the prosecution.<sup>129</sup> As such,

---

125. *Id.* This argument could be considered inconsistent with the Court's prior dicta regarding states' "notice-and-demand" statutes. *Melendez-Diaz*, 129 S. Ct. at 2541 (stating that "[s]tates are free to adopt procedural rules governing objections" because "[t]he defendant *always* has the burden of raising his Confrontation Clause objection").

126. *Bullcoming III*, 131 S. Ct. at 2719-23 (Sotomayor, J., concurring). Justice Sotomayor's replacement of Justice Souter caused much speculation as to the future of the Court's interpretation of the Confrontation Clause. Jonathan Adler, *Souter, Sotomayor, & Melendez-Diaz v. Massachusetts, THE VOLOKH CONSPIRACY* (June 29, 2009, 5:55 AM), <http://volokh.com/posts/1246125087.shtml> (speculating that Justice Sotomayor's prior history as a prosecutor and trial court judge "may lead her to take a more pragmatic, and less bright-line-oriented approach" and that "her ascension to the Court could have dramatic consequences for criminal law, as she could create a new Court majority on these issues and roll back recent decisions on the Confrontation Clause, sentencing rules, and other areas of criminal law"); Lyle Denniston, *Analysis: Is Melendez-Diaz Already Endangered?*, SCOTUSBLOG (June 29, 2009, 1:51 PM), <http://www.scotusblog.com/2009/06/new-lab-report-case-granted/> (speculating as to why, so soon after deciding *Melendez-Diaz*, the Court granted certiorari in *Briscoe v. Virginia*, 130 S. Ct. 1316 (2010)).

127. *Bullcoming III*, 131 S. Ct. at 2719 (Sotomayor, J., concurring). Justice Thomas did not join Justice Sotomayor's concurrence, but for him, formality is arguably an essential aspect of determining the testimonial nature of evidence. *See Melendez-Diaz*, 129 S. Ct. at 2543 (Thomas, J., concurring). This formality requirement may be the very reason the *Bullcoming* majority used the word to describe the blood sample report. *See Bullcoming III*, 131 S. Ct. at 2717. It may also be why Justice Thomas refused to join in footnote 6. *Id.* at 2714 n.6 (stating not that a testimonial statement must be formal, but that it must have the "'primary purpose' of 'establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution'" (alteration in original) (citing *Davis v. Washington*, 547 U.S. 813, 822 (2006))).

128. Josephine Ross, *What's Reliability Got to Do With the Confrontation Clause After Crawford?*, 14 WIDENER L. REV. 383, 386 n.20 (2009); *Crawford v. Washington*, 541 U.S. 36, 51 (2004) ("An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.").

129. *Bullcoming III*, 131 S. Ct. at 2722-23 (Sotomayor, J., concurring). Instead of providing clarity on the majority opinion, Justice Sotomayor's concurrence almost guarantees the Supreme Court will be asked to review Confrontation Clause appeals matching each of the "factual circumstances" she described. The Court has already accepted certiorari in *Williams v. Illinois*, where Illinois used Federal Rule of Evidence 703 to allow an uninvolved expert witness to rely on underlying testimonial reports (which

her concurring opinion provides an excellent analytical vehicle for evaluating how these potential future cases may impact the Court's interpretation of the Confrontation Clause. The remainder of this Note will address Justice Sotomayor's limitations on *Bullcoming* and evaluate *Williams v. Illinois*,<sup>130</sup> the Court's next significant evolution of Confrontation Clause jurisprudence.

#### IV. JUSTICE SOTOMAYOR'S FOUR *BULLCOMING* LOOPHOLES

##### A. *The Evidence is Offered for "an Alternate Purpose"*

Justice Sotomayor first stressed that the *Bullcoming* prosecutors did not suggest that the blood sample report was provided for "an alternate purpose," suggesting the Court may have reached a different result had the blood sample report been conducted for the purposes of medical treatment.<sup>131</sup> However, the Court has previously indicated in recent decisions that statements made for the purposes of medical diagnosis or treatment were not statements made for the "primary purpose" of use at trial and, therefore, not testimonial nor subject to the Confrontation Clause.<sup>132</sup> Justice Sotomayor's concurrence only mentions statements for the purposes of medical treatment as an example of an "alternate purpose" for the blood sample report, likely because this may be the only exception under Federal Rule of Evidence 803 that a state could logically use to admit a blood sample report into evidence.<sup>133</sup> It will be interesting to see if, in the wake of *Bullcoming*, prosecutors seek other exceptions under the Federal Rules of Evidence by asserting the evidence was generated for or served another purpose.

##### B. *The Report is Merely a Machine-Generated Printout*

Justice Sotomayor also stated that the *Bullcoming* decision did not address scenarios where the statements admitted at trial are simply printouts of data from laboratory machines.<sup>134</sup>

---

were never admitted into evidence) to form the basis of her opinion at trial. *Williams v. Illinois*, 131 S. Ct. 3090 (June 28, 2011) (No. 10-8505), 2011 WL 2535081.

130. 131 S. Ct. 3090.

131. *Bullcoming III*, 131 S. Ct. at 2722 (Sotomayor, J., concurring).

132. *Michigan v. Bryant*, 131 S. Ct. 1143, 1157 n.9 (2011) (listing Federal Rule of Evidence 803(4) as one of many hearsay exceptions made for a purpose other than prosecution); *Melendez-Diaz*, 129 S. Ct. at 2533 n.2 (stating that "medical reports created for treatment purposes" would not be testimonial).

133. The Federal Rules of Evidence do not permit the states to admit laboratory reports as nontestimonial public records. *See* FED. R. EVID. 803(8); *cf. Melendez-Diaz*, 129 S. Ct. at 2538-40 (discussing why a laboratory report cannot be considered nontestimonial as a business record under Federal Rule of Evidence 803(6)).

134. *Bullcoming III*, 131 S. Ct. at 2722 (Sotomayor, J., concurring) (recognizing the State of New Mexico's argument that the Court did not have to rule on the testimonial nature of machine-generated printouts because the State introduced the analyst's certification of the results instead).

Several courts have held that "raw data" printed from a machine cannot be testimonial, because the machine is the witness "accusing" the defendant.<sup>135</sup> This reasoning, however, is nothing more than "an attempt to cheat *Crawford*,"<sup>136</sup> as any reliance on it overlooks the fact that these scientific tests could not be performed without a human element,<sup>137</sup> which is susceptible to mistakes.<sup>138</sup> Further, a person operating the machine must, at some point, record the evidence as belonging to a particular suspect; would this declaration of the sample's ownership not be, in and of itself, testimonial?<sup>139</sup>

Technicians operating crime laboratory equipment must first undergo significant training and carefully follow crucial steps to ensure the accuracy of the machine-generated data.<sup>140</sup> Even if the analyst is aware of the laboratory's procedures, cross-examination for machine-generated printouts is essential to ensure the procedures were actually followed and that the report was not fraudulently produced to overcome backlog and the pressures of law enforcement.<sup>141</sup> Until the Court closes this loophole, prosecutors will likely continue to incorrectly admit machine-generated printouts into evidence, alleging they are nontestimonial because the printouts are simply "raw data."

---

135. *United States v. Lamons*, 532 F.3d 1251, 1263 (11th Cir. 2008) (stating that "the witnesses with whom the Confrontation Clause is concerned are *human* witnesses, and that the evidence challenged in this appeal does not contain the statements of human witnesses"); *United States v. Moon*, 512 F.3d 359, 362 (7th Cir. 2008) ("[T]he Confrontation Clause does not forbid the use of raw data produced by scientific instruments, though the interpretation of those data may be testimonial."); *United States v. Washington*, 498 F.3d 225, 230 (4th Cir. 2007) ("The raw data generated by the diagnostic machines are the 'statements' of the machines themselves, not their operators.").

136. Joe Bourne, Note, *Prosecutorial Use of Forensic Science at Trial: When is a Lab Report Testimonial?*, 93 MINN. L. REV. 1058, 1082 (2009).

137. *Washington*, 498 F.3d at 232-33 (Michael, J., dissenting) (stating that computer-printed test results "were the hearsay statements of the technicians who ran the tests" and that "[t]he test results, although computer-generated, were produced with the assistance and input of the technicians and must therefore be attributed to the technicians").

138. *Id.* at 235 (Michael, J., dissenting) ("Forensic test reports are not always accurate. Testing errors are sometimes caused by technician inexperience, sample contamination, failure to follow laboratory protocols, or breaks in the chain of custody."). Conversely, some automatic machine printouts, such as transmission information including web site addresses or fax numbers, truly may not involve a direct human element. *Id.* at 233 (Michael, J., dissenting) (discussing *United States v. Hamilton*, 413 F.3d 1138 (10th Cir. 2005) (involving computer-generated header information from an internet web site) and *United States v. Khorozian*, 333 F.3d 498 (3d Cir. 2003) (involving transmission information printed on a faxed document)).

139. See Richard D. Friedman, *Thoughts on Bullcoming*, THE CONFRONTATION BLOG (June 24, 2009, 8:12 PM), <http://confrontationright.blogspot.com/2011/06/thoughts-on-bullcoming.html>.

140. *Washington*, 498 F.3d at 233 (Michael, J., dissenting); see, e.g., *supra* note 65 and accompanying text.

141. See *supra* notes 59-62 and accompanying text.

C. *The Substitute Witness is a Supervisor or Test Reviewer*

Post *Melendez-Diaz*, many states recognized they had a duty to provide defendants with a knowledgeable analyst suitable for cross-examination.<sup>142</sup> For example, the Confrontation Clause would not allow the prosecution to substitute the crime lab receptionist for cross-examination in place of a scientific analyst. Therefore, a testifying analyst who had not performed the actual tests would be required to meet certain standards to pass the requirements of the Confrontation Clause.

While *Bullcoming* made clear a surrogate witness who had no personal knowledge of the scientific test at issue would not meet the requirements of the Confrontation Clause, Justice Sotomayor's concurrence stated that *Bullcoming* does not apply to cases involving a "supervisor, reviewer, or someone else with a personal, albeit limited, connection" to the test.<sup>143</sup> But how involved in the testing process must the testifying witness have been?

Many courts held that the expert witness needed to have been involved in the testing process itself at some level. Both the Fourth and Seventh Circuit Courts of Appeals have held that it was not a Confrontation Clause violation when the non-test-performing analyst who developed conclusions based upon test results testified at trial.<sup>144</sup> The Florida Supreme Court relied on these cases when it held expert testimony did not violate the Confrontation Clause, so long as the person making the conclusions based on the test results "was present at trial and subject to cross-examination with regard to those results."<sup>145</sup> While these courts did require the witness to have had significant involvement with interpreting the test results, none actually required the employee who performed the test to face confrontation at trial.<sup>146</sup>

---

142. See *Pendergrass v. State*, 913 N.E.2d 703, 708 (Ind. 2009) (holding that the testimony of a supervisor at the crime lab and a DNA expert witness provided the defendant with "two witnesses who were directly involved in the substantive analysis"), *cert. denied*, *Pendergrass v. Indiana*, 130 S. Ct. 3409 (2010); *State v. Dilboy*, 999 A.2d 1092, 1104-05 (N.H. 2010) (holding that testimony from the assistant laboratory director who reviewed the test results was sufficient to provide the defendant his Confrontation Clause rights), *vacated*, *Dilboy v. New Hampshire*, 131 S. Ct. 3089 (2011) (vacating and remanding for further proceedings in light of *Bullcoming*).

143. *Bullcoming III*, 131 S. Ct. 2705, 2722 (2011) (Sotomayor, J., concurring) ("We need not address what degree of involvement is sufficient because here Razatos had no involvement whatsoever in the relevant test and report.").

144. *United States v. Moon*, 512 F.3d 359, 362 (7th Cir. 2008) (holding it was the interpretation of the raw data, not the test results, that may be testimonial); *United States v. Washington*, 498 F.3d 225, 229-30 (4th Cir. 2007) (stating that the test-performing employees were technicians, not analysts).

145. *Smith v. State*, 28 So. 3d 838, 854-55 (Fla. 2009), *cert. denied*, *Smith v. Florida*, 131 S. Ct. 3087 (2011).

146. *Moon*, 512 F.3d at 362 (stating "the Sixth Amendment does not demand that a chemist or other testifying expert have done the lab work himself"); *Washington*, 498 F.3d at 229-30 (stating "there would be no value in cross-examining the lab technicians"); *Smith*, 28 So. 3d at 854-855.

Some courts strayed beyond the expert who analyzed the material to allow laboratory supervisors to testify at trial. These courts have held that laboratory supervisors could adequately testify to the standard procedures used in a laboratory, explain why specific tests were performed, and address whether those tests required the use of independent judgment and skill.<sup>147</sup> Many courts sharing this view ruled this way because the supervisors were personally involved in the work of their laboratory employees.<sup>148</sup>

Supervisors might be a sufficient alternative to the test-performing analyst because they are responsible for the operations of their laboratories. They can be questioned about the procedures they established in the lab and how those procedures guarantee accurate test results. Supervisors also are charged with monitoring their employees' performances and have more personal knowledge of an employee's analytical skills than a regular colleague would possess. Finally, supervisors frequently have more training than their employees, which gives them the ability to critically review test results and recognize deficiencies in performance.

However, even a laboratory supervisor might not be able to testify whether the laboratory procedures were followed if they did not watch their subordinate perform the entire test. Lab tests are quite complicated, taking significant amounts of time and often involving the coordination of several analysts, not just one.<sup>149</sup> Given these facts, it would be extremely unlikely that laboratory supervisors could monitor the procedures of all of their employees closely enough to be able to testify about the procedures used based on their personal knowledge.<sup>150</sup>

---

147. *Dilboy*, 999 A.2d at 1104; *see also Pendergrass*, 913 N.E.2d at 708 (holding that competent testimony from a supervisor prevented the defendant from complaining that he lacked adequate opportunity to cross-examine a witness).

148. *United States v. Turner*, 591 F.3d 928, 931 (7th Cir. 2010) (where the supervisor had peer-reviewed the test-performing employee's work), *petition for cert. filed*, No. 09-10231, (Apr. 12, 2010); *Washington*, 498 F.3d at 229-30 (where the lab's chief toxicologist made conclusions based on test results performed by lab technicians under his supervision); *Smith*, 28 So. 3d at 853 (where the supervisor interpreted the data based on test results from biologists on her team); *Pendergrass*, 913 N.E.2d at 707-08 (where the supervisor had personally performed a technical review of the employee's tests); *Dilboy*, 999 A.2d at 1097 (where the testifying analyst was the assistant laboratory director of the state police forensics toxicology lab).

149. *See, e.g.*, Brief of the States of Indiana, et al. as Amici Curiae in Support of Respondent at 9-10, *Briscoe v. Virginia*, 130 S. Ct. 1316 (2010) (No. 07-11191) (stating that in New York, the crime labs "use an assembly-line-like rotation system for DNA analysis, sometimes involving up to 40 analysts per case").

150. Should a supervisor's personal knowledge even matter when the analyst who certified the test results may not remember the test by the time of trial? *See* Brief for the Respondent in Opposition at 36, *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (No. 07-591) (stating that the lab technician who performed the test may often fail to "recall from actual memory information relating to the specific contents of the writing and would rely instead upon the record of his or her own action") (quoting *People v. Johnson*, 121 Cal. App. 4th 1409, 1413 (Cal. Ct. App. 1st Dist. 2004)). Strictly applying "*Crawford* may 'seem particularly nonsensical when there is little chance that the actual declarant, the author of

*D. The Witness Relied on Testimonial Evidence to Give Her Independent Opinion*

Justice Sotomayor also limited *Bullcoming* by stating the opinion did not address cases in which “expert witness[es] w[ere] asked for [their] independent opinion[s] about underlying testimonial reports that were not themselves admitted into evidence.”<sup>151</sup> Such a scenario occurs when the prosecution attempts to avoid Confrontation Clause issues by giving a laboratory report to an uninvolved expert witness to discuss at trial under the guise of Federal Rule of Evidence 703, which states:

The facts or data in the particular case upon which an expert bases an opinion or inference . . . need not be admissible in evidence *in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.*<sup>152</sup>

Per Rule 703, the prosecution can even argue testimonial evidence should be disclosed at trial, not for the truth of the matter, but instead to allow the jury to better evaluate the expert witness’s opinion.<sup>153</sup> Further, Federal Rule of Evidence 705 aids the prosecution by making clear that testimonial facts and data could be revealed under cross-examination.<sup>154</sup> “One of the greatest dangers in allowing otherwise inadmissible evidence under Rule 705,” however, “is that the jury will consider the facts and data as substantive evidence rather than as merely constituting the underlying basis for the expert’s opinion.”<sup>155</sup> Instead of solely serving as an evidence rule for expert

---

the forensic report, will still have an independent memory of conducting the test by the time of trial.” *Id.* (quoting Jennifer L. Mnookin, *Expert Evidence and the Confrontation Clause After Crawford v. Washington*, 15 J.L. & POL’Y 791, 836 (2007)).

151. *Bullcoming III*, 131 S. Ct. 2705, 2722 (2011) (Sotomayor, J., concurring).

152. FED. R. EVID. 703 (2010) (emphasis added to reflect new language added during the 2000 amendment to Rule 703). The Federal Rules of Evidence were amended in December 2011 for stylistic purposes, but the amendments were not intended to change the rules substantively. FED. R. EVID. 703 advisory committee’s note. The State of Illinois has not adopted the 2000 amendment to Rule 703. Brief in Opposition for the Respondent at 10 n.5, *Williams v. Illinois*, 131 S. Ct. 3090 (2011) (No. 10-8505), 2011 WL 2535081. The pre-2000 Rule 703 is arguably even more prone to misapplication, “result[ing] in the destruction of constitutional rights.” Ronald L. Carlson, *Is Revised Expert Witness Rule 703 A Critical Modernization for the New Century?*, 52 FLA. L. REV. 715, 725, 744 (2000) (arguing prior judicial misapplications should end with the adoption of the new amended rule).

153. Brief in Opposition for the Respondent, *supra* note 152, at 10.

154. FED. R. EVID. 705 (2010) (stating “[t]he expert may in any event be required to disclose the underlying facts or data on cross-examination”). The Federal Rules of Evidence were amended in December 2011 for stylistic purposes, but the amendments were not intended to change the rules substantively. FED. R. EVID. 705 advisory committee’s note.

155. *Valle v. State*, 109 S.W.3d 500, 505-06 (Tex. Crim. App. 2003) (quoting *Cole v. State*, 839 S.W.2d 798, 815 (Tex. Crim. App. 1990) (Maloney, J., concurring on rehearing)); see also Daniel F. Blanchard, III, *South Carolina Evidence Rule 703: A Backdoor Exception*



witnesses, Rule 703 has, in effect, created an additional exception to the rules against hearsay.<sup>156</sup>

With the risk of the jury considering the scientific evidence for the truth of the matter, it is hard to imagine a defendant could effectively use cross-examination when it would merely result in the jury hearing additional, unverified, testimonial information from the expert witness. As Justice Sotomayor acknowledged, prosecutors using the Federal Rules of Evidence to "allow[] an expert witness to discuss others' testimonial statements" would present a different question for the Court indeed.<sup>157</sup>

For this *Bullcoming* loophole, however, the Court is not postponing ruling on the issue. Five days after deciding *Bullcoming*, the Court granted certiorari in *Williams v. Illinois*.<sup>158</sup> Given that the Court only needs four Justices' votes to hear a case,<sup>159</sup> it could have been the four dissenting Justices from *Bullcoming* who voted to grant certiorari. While any attempts to guess a motive (or the identity of the Justices granting certiorari) would be mere speculation, if it was the four dissenting Justices, they could be hoping to limit the Confrontation Clause's constitutional requirements to cases where the prosecution actually admits a laboratory or scientific report into evidence.

#### V. WILLIAMS V. ILLINOIS: THE COURT'S OPPORTUNITY TO CLOSE ONE OF JUSTICE SOTOMAYOR'S BULLCOMING LOOPHOLES

Instead of allowing the *Bullcoming* dissenters to narrow the protections of the Confrontation Clause, the Court should use *Williams v. Illinois*<sup>160</sup> to shore up its Confrontation Clause jurisprudence regard-

---

to the Hearsay Rule?, 13 S.C. LAWYER 14, 17 (2002) (stating "if in forming an opinion someone assumes that certain facts are true, the acceptance of that opinion necessarily involves the acceptance of those assumed facts" (citing Paul R. Rice, *Inadmissible Evidence as a Basis for Expert Opinion Testimony: A Response to Professor Carlson*, 40 VAND. L. REV. 583, 584-85 (1987)); Carlson, *supra* note 152, at 736 ("The grave risk that jurors will misuse the testimony as substantive proof has been widely recognized.")). Once the jury hears the testimonial evidence, the horse is arguably out of the barn:

[J]urors are asked to do the impossible. They are told to consider the hearsay, not for its truth, but only as the basis of the expert[']s opinion. No one truly believes jurors (or anyone else for that matter) are capable of making that subtle distinction. Instead, jurors consider the hearsay even when the evidence is regarded as too unreliable for admission as substantive evidence.

L. Timothy Perrin, *Expert Witness Testimony: Back to the Future*, 29 U. RICH. L. REV. 1389, 1403 (1995) (footnotes omitted).

156. Petition for Writ of Certiorari at 14, *Williams v. Illinois*, 131 S. Ct. 3090 (2011) (No. 10-8505), 2011 WL 2535081 (citing MICHAEL H. GRAHAM, *GRAHAM'S HANDBOOK OF ILLINOIS EVIDENCE* § 703.1, at 684 (10th ed. 2010)).

157. *Bullcoming III*, 131 S. Ct. 2705, 2722 (2011) (Sotomayor, J., concurring).

158. 131 S. Ct. 3090 (2011).

159. JAMES P. GEORGE, *THE FEDERAL COURTHOUSE DOOR: A FEDERAL JURISDICTION GUIDE* 170 (2002) (citing *Harris v. Pa. R.R. Co.*, 361 U.S. 15 (1959)).

160. 131 S. Ct. 3090 (2011).

ing the admission of scientific evidence against a defendant. States should not be allowed to evade constitutional protections by keeping laboratory reports secret and using Rule 703 to justify the use of “surrogate” expert witnesses when, if the reports were entered into evidence, *Bullcoming* would require cross-examination of the analysts who certified them.<sup>161</sup>

#### A. Williams v. Illinois: *The Facts*

In April 2001, Sandy Williams was arrested for sexual assault, aggravated kidnapping, and aggravated robbery.<sup>162</sup> More than one year earlier, in February 2000, a twenty-two-year-old woman identified as “L.J.” had been attacked while walking home from work after 8:00 p.m. in Chicago.<sup>163</sup> L.J.’s mother contacted the police, who arrived at L.J. and her mother’s home shortly after 9:00 p.m.<sup>164</sup> L.J. described the perpetrator as “a black male, 5 foot, 8 inches tall, wearing a black skull cap, a black jacket and driving a beige station wagon.”<sup>165</sup>

While L.J. was at the hospital, the police stopped James McChristine, who was driving a beige station wagon near the scene of the attack, and brought him to the hospital.<sup>166</sup> An officer testified that L.J. “positively identified” McChristine as her attacker that night; at William’s trial, L.J. testified that she told the officer that McChristine was not her attacker.<sup>167</sup>

The hospital sent the Illinois State Police Crime Lab evidence from L.J.’s rape examination, including her blood sample and vaginal swabs.<sup>168</sup> Semen was detected in the vaginal sample, and the evidence was stored in a freezer for nine months until it was sent to Cellmark, a laboratory in Illinois for DNA analysis.<sup>169</sup> Cellmark returned a report providing a DNA profile of the semen from the vaginal swab.<sup>170</sup> A DNA “hit” was generated in March 2001 linking Williams to

---

161. A narrow reading of *Melendez-Diaz* would have allowed states to evade Confrontation Clause requirements by admitting into evidence unsworn laboratory certificates or other scientific reports. Moreno, *supra* note 75, at 331. Similarly, a narrow reading of *Bullcoming* would allow states to evade Confrontation Clause requirements by using Rule 703 to have an expert witness base their conclusions on inadmissible testimonial evidence.

162. *Williams II*, 939 N.E.2d 268, 270 (Ill. 2010), *cert. granted*, 131 S. Ct. 3090 (June 28, 2011) (No. 10-8505).

163. *Id.*

164. *Id.*

165. *Id.*

166. Petition for Writ of Certiorari, *supra* note 156, at 5.

167. *Id.*; see *People v. Williams (Williams I)*, 895 N.E.2d 961, 963 (Ill. App. Ct. 2008), *aff’d in part and rev’d in part*, 939 N.E.2d 268 (Ill. 2010), *cert. granted*, 131 S. Ct. 3090 (June 28, 2011) (No. 10-8505).

168. *Williams II*, 939 N.E.2d at 270.

169. *Id.* at 270-71.

170. *Id.* at 271.

L.J.'s attack, after which L.J. identified Williams as her attacker in a lineup.<sup>171</sup>

At trial, forensic biologist Sandra Lambatos stated that she matched Cellmark's reported DNA profile to Williams, whose DNA was in the Illinois DNA database from an unrelated arrest.<sup>172</sup> She did not personally analyze the semen sample sent to Cellmark, instead relying on the DNA profile within the resulting report.<sup>173</sup> Cellmark's report reflected that the semen sample contained "a mixture of DNA profiles," and Lambatos "opined" that Cellmark likely extracted L.J.'s DNA profile from the mixture to deduce the resulting male's DNA profile.<sup>174</sup> Still, Cellmark's resulting report reflected "unaccounted genetic material," which Lambatos described as "white noise."<sup>175</sup> Lambatos admitted it was possible Cellmark had a degraded evidence sample, though she did not observe any signs of degradation from Cellmark's report.<sup>176</sup>

While Lambatos testified that Cellmark was an accredited laboratory and that they "generally performed proficiency tests" that she developed, she admitted that she did not observe the tests the Cellmark analysts performed and that Cellmark had "different procedures and standards" than the ones followed at the Illinois State Crime Lab.<sup>177</sup> No one from Cellmark testified at William's trial about Cellmark's procedures, how the DNA test was performed, or the education and training of the analysts who performed the test.<sup>178</sup> Williams was sentenced to two concurrent natural life terms, a consecutive 60-year term, and another concurrent term of 15 years.<sup>179</sup>

Relying on Rule 703, the Illinois Court of Appeals rejected Williams's argument that Lambatos could not provide a proper foundation for Cellmark's test results, which were not entered into evidence.<sup>180</sup> The court also rejected Williams's Confrontation Clause arguments, stating that under *Crawford*, the prosecution was permitted to disclose testimonial information at trial to "provide a basis for Lambatos'[s] opinion," and that Cellmark's DNA profile report was not discussed to prove the truth of the matter.<sup>181</sup>

On appeal in 2010, the Illinois Supreme Court held that it was not bound by *Melendez-Diaz*, simply because the prosecution did not offer

---

171. *Williams I*, 895 N.E. 2d at 964.

172. Petition for Writ of Certiorari, *supra* note 156, at 6.

173. *Williams I*, 895 N.E. 2d at 965.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *See id.* at 966.

179. *Id.* at 963.

180. *Id.* at 966-67.

181. *Id.* at 969-70 (citing *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004)).

Cellmark's report into evidence.<sup>182</sup> As such, the court held that a Confrontation Clause violation would only occur if the Cellmark report was hearsay introduced to prove the truth of the matter.<sup>183</sup> Instead of finding that the Cellmark report was admitted to prove Cellmark's assertions, however, the court found "[t]he evidence against the defendant was Lambatos'[s] opinion, not Cellmark's report."<sup>184</sup> Because Lambatos did not read from Cellmark's report and it was part of the data she looked at to form her opinion, it was discussed to show the trial court the basis of her opinion, not to prove the truth as to its contents.<sup>185</sup>

### B. Analyzing *Williams v. Illinois*

While expert witnesses can use inadmissible evidence as the basis for their opinion at trial, the Federal Rules of Evidence cannot trump the Sixth Amendment's constitutionally guaranteed rights.<sup>186</sup> The Supreme Court should not allow states to evade Confrontation Clause requirements solely because a Federal Rule of Evidence, in and of itself, would permit the testimony. Importantly, Rule 703 "does not purport to state a constitutional principle. Nor does it state an evidentiary principle of long standing; it was developed and adopted in the third quarter of the 20th century."<sup>187</sup> As such, Rule 703 appears to work best in civil cases and with nontestimonial evidence, neither of which implicate the Confrontation Clause. But, when Rule 703 does come into conflict with the requirements of the Confrontation Clause, it is unfathomable anyone would suggest the nearly 240-year-old Constitution should give way for an evidentiary rule enacted less than fifty years ago.

Like the Illinois State Supreme Court in *People v. Williams*, many courts have permitted expert witnesses in criminal trials to use scientific evidence as the basis of their opinion, finding that so long as the witness does not disclose the underlying testimonial evidence for the truth of the matter asserted, the defendant's Confrontation Clause rights have not been violated.<sup>188</sup> Experts may not simply

---

182. See *Williams II*, 939 N.E.2d 268, 282 (Ill. 2010), *cert. granted*, 131 S. Ct. 3090 (June 28, 2011) (No. 10-8505), 2011 WL 2535081; Brief in Opposition for the Respondent, *supra* note 152, at 9.

183. *Williams II*, 939 N.E.2d at 277.

184. *Id.* at 279 (stating "there is room for subjective judgment" in the DNA analysis).

185. *Id.* at 282.

186. FED. R. EVID. 703 (2010); *Crawford*, 541 U.S. at 61 (holding "we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence").

187. Richard D. Friedman, *Initial Thoughts on Williams*, THE CONFRONTATION BLOG (July 9, 2011, 2:26 AM), <http://confrontationright.blogspot.com/2011/07/initial-thoughts-on-williams.html>.

188. *United States v. Williams*, 740 F. Supp. 2d 4, 9-10 (D.D.C. 2010) (holding the expert witness could not disclose the underlying testimonial hearsay on which he based his

adopt the opinion of the original analyst or testimonial report; rather, they can only testify to conclusions reached through their own independent judgment.<sup>189</sup> If a substitute analyst will not be "relying upon her own expertise in arriving at her conclusions, . . . the integrity of the judicial system" would be better served by rescheduling the trial so the test-performing analyst can testify.<sup>190</sup>

The real danger with allowing an uninvolved expert witness to testify, without also requiring the testimony of the analyst responsible for the testimonial material, is that the expert may base her decisions on erroneous or corrupt work product. Logically, the expert's opinion is only as solid as the underlying evidence upon which she relied. The test-performing scientist's veracity, capability, and accuracy simply cannot be evaluated in court through a surrogate witness.

As is true with any witness providing hearsay testimony, the trial judge or jury cannot directly uncover the truth of the matter asserted because the witness is testifying to something she did not personally experience. The person who does not witness the scientific tests cannot testify at trial with 100% accuracy to the truth of the evidence upon which she relied. An analyst who was not present when the tests were performed cannot testify whether the lab's procedures were followed or whether the tests were completely fabricated.

Even if the test-performing analyst is an honest, hard-working scientist, it does not necessarily follow that she was competent and did not make a mistake along the way. Like any other expert witness, forcing laboratory scientists to face cross-examination gives the defendant an opportunity to expose a "lack of proper training or deficiency in judgment."<sup>191</sup>

Despite this reasoning, the Court could instead affirm the Illinois Supreme Court's decision in *People v. Illinois*. Perhaps one of the big-

---

opinion); *United States v. Mirabal*, No. CR 09-3207 JB, 2010 WL 3834072, at \*4 (D.N.M. Aug. 7, 2010) (holding that the testifying expert's conclusions "must be her own, and not a parroting of" the other analyst's); *United States v. Alexander*, Nos. 2:04-cr-71, 2:09-cv-294, 2010 WL 404072, at \*4 (N.D. Ind. Jan. 25, 2010) (holding the Confrontation Clause was not violated where the expert testified to his own independent analysis); *Commonwealth v. Avila*, 912 N.E.2d 1014, 1029 (Mass. 2009) (holding that the expert could not testify about the testimonial findings within an autopsy report); *Marshall v. State*, 232 P.3d 467, 475 (Okla. Crim. App. 2010) (holding that the expert witness's testimony "must be confined to his or her own opinions and the expert must be available for cross-examination"); *Wood v. State*, 299 S.W. 3d 200, 213 (Tex. Crim. App. 2009) (holding that disclosing testimonial statements from an autopsy report, even though the witness also testified to his own independent opinion, was a Confrontation Clause violation).

189. *Williams*, 740 F. Supp. 2d at 9. The Fourth Circuit has also held that an expert witness may not testify to the conclusions of another analyst absent from trial in an effort to bolster his or her own opinion. *United States v. Tran Trong Cuong*, 18 F.3d 1132, 1143 (4th Cir. 1994) (prohibiting an expert witness from testifying that his and a more prominent doctor's conclusions were "essentially the same").

190. *Mirabal*, 2010 WL 3834072, at \*6.

191. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2537 (2009).

gest issues the case will turn upon is the Justices' opinion of the "formality" of the Cellmark report. While *Bullcoming* made clear a scientific report does not achieve formality because it is sworn, Justice Thomas and even Justice Sotomayor may find that it is the report's actual admission into evidence that gives the report the requisite formality to be considered testimonial. Justice Thomas may find that a scientific report used by an expert witness at trial but not admitted into evidence does not implicate the types of confrontation issues with which the Framers were historically concerned.<sup>192</sup> Historically, the Framers might not have been concerned with more informal, casual comments being submitted at trial in place of live testimony.<sup>193</sup>

However, whether or not laboratory reports are admitted into evidence should not be the controlling factor in Confrontation Clause jurisprudence. Accusations at trial, particularly ones involving scientific evidence, appear much more formal than casual commentary made to a friend.<sup>194</sup> Further, when expert witnesses are significantly relying on the result of one scientific test to form the basis of their opinions, the expert witnesses become more "summary witness[es]" than experts in their own right.<sup>195</sup>

While it is true that it is Lambatos's expert opinion that is at issue, so too is the authenticity and accuracy of the evidence upon which she based her opinion. Williams should have had not only the opportunity through cross-examination to test the credibility and reliability of the expert but also the authenticity and reliability of the scientific evidence upon which she based her opinion. Williams could not have had this opportunity without the ability to cross-examine the Cellmark analyst who certified the test results.

Such a rule would not unduly burden prosecutors and law enforcement. Twice now the Supreme Court has approved of states' use of notice and demand statutes, which provide a limited window within which a defendant may invoke—or else waive—her Confrontation Clause right after receiving notice of the government's intent to use scientific evidence at trial.<sup>196</sup> In fact, "there is no evidence that the criminal justice system has ground to a halt in the States that, one way or another, empower a defendant to insist upon the analyst's ap-

---

192. Ross, *supra* note 128, at 386 (stating that "Justice Thomas believes that the Court should determine which abuses threatened confrontation rights at the time of the Founders, and freeze the application of the Clause to cover only those abuses").

193. *Id.* at 385-86.

194. *Id.* at 386 (stating "jurors often believe statements made to doctors"); *see also supra* note 69 about the "CSI Effect."

195. *See* United States v. Williams, 431 F.2d 1168, 1172 (5th Cir. 1970) (stating that a witness needs to rely on multiple sources of evidence and use them to form his own opinion, not simply summarize the content of an extrajudicial statement).

196. *Bullcoming III*, 131 S. Ct. 2705, 2718 (2011); *Melendez-Diaz*, 129 S. Ct. at 2541.

pearance at trial.”<sup>197</sup> With few cases actually going to trial, and defendants frequently stipulating the admission of forensic evidence in the cases that do,<sup>198</sup> prosecutors have the ability to manage the Confrontation Clause’s constitutional requirements.

## VI. CONCLUSION

States cannot ignore the obligations of the Confrontation Clause simply because the Clause might make “the prosecution of criminals more burdensome.”<sup>199</sup> Indeed, the Court has shown its willingness to enforce constitutional guarantees, even though these protections may result in additional costs for taxpayers.<sup>200</sup> Through its Confrontation Clause jurisprudence in *Crawford*, *Melendez-Diaz*, and *Bullcoming*, the Court has already established that a surrogate witness cannot testify to laboratory reports certified by other scientists not appearing at trial. By reversing the Illinois Supreme Court’s decision in *People v. Williams*, the Court would affirm the importance of preventing the admission of accusatory hearsay evidence without cross-examination in criminal trials. Prosecutors should not be able to dodge the Confrontation Clause’s requirements simply by keeping a testimonial report, upon which the testifying substitute witness bases their decision, out of evidence.<sup>201</sup>

Following *Bullcoming*, only one proposition in Confrontation Clause jurisprudence is certain: We have not heard the Court’s last word on the Sixth Amendment’s requirements for the admission of scientific evidence in criminal trials.

---

197. *Melendez-Diaz*, 129 S. Ct. at 2541.

198. *Bullcoming III*, 131 S. Ct. at 2718 (Ginsberg & Scalia, JJ.).

199. *Melendez-Diaz*, 129 S. Ct. at 2540 (stating the right of confrontation is “binding” and comparing it to the right of trial by jury and the privilege against self-incrimination).

200. See, e.g., Brief of Law Professors as Amici Curiae in Support of Petitioner at 6, *Melendez-Diaz*, 129 S. Ct. 2527 (No. 07-591) (citing *Gideon v. Wainwright*, 372 U.S. 335, 340 (1963) as an example).

201. See *Davis v. Washington*, 547 U.S. 813, 826 (2006) (holding that “we do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman recite the unsworn hearsay testimony”).

